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On the Path From *White* to *Schwinn* to *Sylvania* to . . . ?

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I. Introduction

Those who fear that indiscriminate institutional bias favoring fragmented competition in the theoretically unregulated sector of the American economy[1] not only opposes the efficiency expected of free markets, but is also insensitive to the challenges of a world economy, to the detriment of the American consumer and society in general, welcomed the Supreme Court's decision in *Continental T. V., Inc. v. GTE Sylvania Inc.*[2] The decision contains important lessons concerning design and implementation of vertically-imposed restraints in the distribution chain.

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1. "Throughout the history of [federal antitrust statutes] it has been *constantly assumed* that one of their purposes was to perpetuate and preserve for its own sake and *in spite of possible cost*, an organization of *industry in small units* which can effectively compete with each other." United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (emphasis added). The elevation of this assumption to an article of faith is suggested by the following words of FTC Chairman Michael Pertschuk: "This economic size means economic and political power. I think that concentrating economic and political power in an entity in our society is antithetical to the democratic tradition." FORBES, August 15, 1977, at 41. Chairman Pertschuk amplified these views in a speech entitled New Directions for the FTC delivered in November 1977 before the 11th New England Antitrust Conference. He then observed that

> antitrust cases have not focused with enough frequency or intensity on the most important questions . . . . [T]o bring the structure and behavior of major industries and, indeed, of the economy itself more into line with the nation's democratic political and social ideals . . . . [a]ntitrust has been preoccupied with, if not entirely overtaken by, the narrow economic objective of allocative efficiency . . . . When institutions get out of human scale, the result is alienation—and alienation yields up increasing inefficiency as well as unhappiness. . . . Competition policy cannot make every person a company president, but it can help assure that there will be enough presidencies to aspire to so that the system will not be stifled by a pervasive feeling that there is no room at the top. . . . Competition policy must sometimes choose between greater efficiency, which may carry with it the promise of lower prices, *and other social objectives*, such as the dispersal of power, which may result in marginally higher prices. . . . We are . . . well along the path to competition rulemaking.

840 ANTITRUST & TRADE REG. REP. (BNA) at 1-4, F (11/24/77) (emphasis added).

2. 97 S. Ct. 2549 (1977). *See also* the summary order of remand to the Ninth Circuit in McClatchy Newspapers v. Noble, 97 S. Ct. 2966 (1977).

A. *The Schwinn Per Se Rule*

Sylvania sounded the death-knell for the ill-conceived *Schwinn*[3] per se rule.[4] The *Schwinn* holding originated in litigation about a supplier's resale restrictions on its wholesalers and authorized dealers.[5]

Although vertically-imposed territorial restraints were not properly before the Supreme Court in *Schwinn*, Justice Fortas summarized for the majority that

> [o]nce the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter *to restrict territory or persons to whom* the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of §1 of the Sherman Act.[6]

This language appeared only five years after Justice Douglas had written for the majority in *White Motor Co. v. United States*[7] that the Court knew too little of either "the economic and business stuff out of which" vertically-imposed territorial and customer-selection restraints on resale emerge or their "actual impact . . . on competition to decide whether they . . . [warrant characterization[8]] . . . as *per se* violations of the Sherman Act."[9]

Apparently the Court believed it had acquired sufficient socio-economic data by 1967 to announce a per se rule prohibiting territorial and customer-selection restraints on resale even though the plaintiff did not seek a judicial pronouncement of such draconian nature.[10] Regret-

3. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
4. *Id.* at 378-79.
5. *Id.*
6. *Id.* at 382 (emphasis supplied). Restraints in the distribution chain ("vertical restraints" or "vertically-imposed restraints") may be imposed by suppliers on their immediate vendees and on those who procure from the supplier's direct customers, by customers on suppliers, and by enterprises on their own conduct vis-a-vis actual or potential reciprocals. The quoted language in *Schwinn* and comparable expressions in other decisions have fostered the general use of "manufacturer" as a substitute for "supplier" in academic and judicial formulations concerning vertical restraints. *E.g., Vertical Restrictions Limiting Intrabrand Competition*, ABA ANTITRUST SECTION MONOGRAPH NO. 2, 2 n.3, 3 (1977). The author endeavors to limit use of the word "manufacturer" to those situations in which it is literally correct. A given distribution chain susceptible to vertically-imposed restraints may include "suppliers" engaged in extraction, intermediate processing, finishing, marketing, transport, or other industries, and the restraints in question may originate at any one of these industrial levels and operate on any of the other industries. Presumably, the Supreme Court did not intend to limit the *Schwinn* per se rule to restraints imposed by "manufacturers," as opposed to "suppliers," on their customers and subcustomers.
7. 372 U.S. 253, 263 (1963).
8. This refers to the rationale for characterizing a restraint as offensive per se enunciated in Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
9. White Motor Co. v. United States, 372 U.S. 253, 263 (1963). Interestingly, in his dissent, Mr. Justice Clark predicted promulgation of such a per se rule within five years. *Id.* at 283.
10. Brief for Appellant at 2, 23, 29, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). The government half-heartedly sought enunciation of a doctrine of "presumptive illegality" similar to that in United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brief for Appellant at 41, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

tably, the *Schwinn* majority did not articulate which other practices sufficiently threatened free market principles to warrant condemnation. Vertically-imposed restraints on physical locations from which resales could be made, at issue in the *Sylvania* decision,[11] were not specifically included in the practices condemned by *Schwinn*.[12]

The unexpected leap to a per se formulation gave rise to the anomaly that while the per se rule applied to distributors' restrictions on territories and customers, the same restrictions were remitted to the "rule of reason"[13] when imposed on agents or consignees.[14] This distinction ignored the realities that consignees may possess the same freedom of decision as buyers-for-resale and also that the Sherman Act does not read on contracts "for sale" as contrasted with contracts of agency or consignment.[15] Further, although judicial characterization of a certain trade restraint as offensive per se generally precludes argument about the reasonability of later indulgences in such conduct,[16] *Schwinn* apparently adopted a *qualified* per se rule for vertically-imposed territorial or customer-selection restrictions. In *Schwinn* Justice Fortas seemed to suggest commercial contexts in which such constraints would not be exposed to per se condemnation because of the nature of the perpetrator or the vigor with which it sought to implement the restraint.[17]

B. *Per Se Rules In General*

Potentially far more important than the undoing of the *Schwinn* doctrine is a signal implicit in both the text and context of the majority

11. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2552 (1977).

12. Brief for Appellant at 16 n.7, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). The ultimate order in *Schwinn* made it quite clear that

> nothing [would] prevent Schwinn from maintaining and creating or eliminating areas or territories of prime responsibility for its distributors; from choosing and selecting its distributors and retailers or designating geographic areas in which such distributors shall respectively be primarily responsible for distributing . . . ; ***from designating in its retailer franchise agreements the location of the place or places of business for which the franchise is issued*** . . . .

United States v. Arnold, Schwinn & Co., 291 F. Supp. 564, 565-66 (N.D. Ill. 1968) (emphasis added). A subsequent decree concluding a prosecution for *horizontally-agreed* territorial allocation also respected legitimacy of location clauses. United States v. Topco Assoc., Inc., 319 F. Supp. 1031 (N.D. Ill. 1970), *aff'd*, 414 U.S. 801 (1973). Legitimacy of such clauses is not a new issue. United States v. General Motors Corp., 384 U.S. 127, 139-40 (1966); Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).

13. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); United States v. Union Pac. R.R., 226 U.S. 61, 87 (1912); Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911).

14. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379-81 (1967).

15. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970).

16. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

17. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380-81 (1967). Applicability of the tying per se rule is also subject to rebuttal. Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 560-61 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

opinion in *Sylvania* that the present Court is receptive to well-conceived attacks on predicates for prior characterizations of commercial conduct as offensive per se to section 1 of the Sherman Act. Concerning context, note that reversal of *Schwinn* was not indispensable to the ultimate disposition of *Sylvania*. Location constraints dealt with in *Sylvania* were not explicitly proscribed by the *Schwinn* decision. Consequently, their appraisal under the rule of reason was feasible.[18] Concerning text, the *Sylvania* opinion explicitly endorses the per se mechanism. Justice Powell, writing for the majority, invoked the classic *Northern Pacific* explication of the per se mechanism's role.

> There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively* presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[19]

This teaching is refined by Justice Powell's observation that "[p]er se rules of illegality are appropriate *only* when they relate to conduct that is *manifestly* anti-competive."[20] He stressed that litigatory efficiencies are insufficient to justify creation of per se rules.[21] This contrasts notably with Justice Marshall's apologia in *United States v. Topco Associates, Inc.*[22]

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.[23]

While there was truth in this confession, this rationale should never justify characterizing a practice as antisocial on its face. Hopefully *Sylvania* marks a retreat from the propensity to condemn that which is not understood precisely because it is not understood.

While the demise of the unfortunate *Schwinn* per se rule indicates this Court will not be blinded with stereotypes or beguiled by specters, the majority opinion in *Sylvania* protests a bias in favor of per se characterizations of trade restraints adopted on the horizontal level and vertically-imposed resale price maintenance.[24] Superficially, the predicates supporting condemnation of the latter are the same stuff out of

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18. *Sylvania* ranks with Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), as a judicial exercise in stretching to make or unmake law when such an effort is unnecessary to resolving the controversy between the immediate parties. Justice Powell wrote the majority opinion in both decisions.

19. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2558 (1977) (emphasis added).

20. *Id.*

21. *Id.*, n.16.

22. 405 U.S. 596 (1972).

23. *Id.* at 609-10.

24. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2558-59 n.19, 2562 n.28 (1977).

which *Schwinn* was drawn, and one wonders about the manifest anticompetitiveness of resale price maintenance with particular emphasis on suppliers' unilateral fixing of *maximum* resale prices. The unnecessary stretching to undo *Schwinn* in combination with reorienting the per se characterization to focus on the "manifestly anticompetitive" suggests the Court is willing to review at least some established characterizations of commercial conduct as offensive per se.

It will not be an easy path for those seeking review of *any* given per se rule. Such persons, in devising a strategy, should draw a lesson from the difficulties experienced by the Justice Department in the *Huck* case,[25] in which the government belatedly sought reversal of the *General Electric* doctrine[26] that assessed price-fixing by licensors of patents under the rule of reason.[27] Further, counsellors dealing with vertically-imposed restraints, including those most directly affected by *Sylvania*, must remain wary of the FTC and its *current* authority to address activities that may transgress the antitrust laws[28] or otherwise offend national policy as perceived by the Commission.[29]

This article will consider "nonprice vertical restrictions"[30] in light of *Sylvania* and its implication for commercial relationships in the distribution chain. Because counselling of commercial enterprises requires consideration of devices beyond the vertically-imposed territorial restraints in *Schwinn* and *Sylvania*, this article will discuss a broad range of restrictive techniques used by either suppliers or customers. A secondary purpose, inescapable in light of *Sylvania*'s re-examination of per se rules, is the consideration of certain devices commonly thought to demand treatment as offensive per se.

II. The Arena

A. *Commerce*

To say that commercial life is variegated is to indulge in simplication. The illusion can no longer be indulged that this nation or continent is self-sustaining. If a lesson can be drawn from OPEC,[31] Soviet grain

25. United States v. Huck Mfg. Co., 227 F. Supp. 791 (E.D. Mich. 1964), *aff'd by an evenly divided Court*, 382 U.S. 197 (1965).

26. United States v. General Electric Co., 272 U.S. 476 (1926).

27. At the trial level in *Huck*, the government did not seek to challenge the *General Electric* rule, but urged on appeal that price-fixing within the patent licensing relationship be characterized as violative per se of § 1 of the Sherman Act.

28. FTC v. Brown Shoe Co., 384 U.S. 316 (1966). *See* note 101 and accompanying text *infra*.

29. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). *See* note 58 and accompanying text *infra*.

30. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2558-59 n.18 (1977).

31. Organisation of Petroleum Exporting Countries (OPEC) is a Vienna-based consortium of nations whose purpose is setting price schedules for certain petroleum products produced in and exported from their respective territories. While its ability to ignore the relevance of demand to price has been largely successful in the short-term, its long-term

speculation, the coffee cartel and other manifestations of officially-sanctioned and even government-led cartels,[32] it is that the American public is now aware the nation is necessarily a participant in a multi-national economy on a non-charitable basis. Popular acceptance of this fact has been furthered by the very real and ominous international emergence of anticompetitive forces comparable to those against which the Sherman Act was deployed originally. While politicians can still attract public attention with the specter of IBM, ITT, General Motors, or the integrated oil companies imposing an economic lock on the nation, it is arguable that the Sherman and Clayton Acts[33] have not failed in their economic purpose within the jurisdictional reach of the United States but that our institutional preference for domestic fragmentation prejudices the United States' competitive position in world markets.

Within the United States and other industrial nations, complex procurement and distribution problems attend production and marketing of goods and services. Integration within a commercial entity of several steps in the chain running from capital investment and resource exploitation through ultimate distribution is not uncommon. Such integration is never total, although it is a conceivable objective. To the degree that integration of functions is efficiently managed, it puts substantial pressure on competitors who have not acted similarly.

Competition in distribution entails use of various techniques, which are shaped by the nature of the product or service and the perceived field of customers, to foster demand. Quality or its image is frequently important to decisions by the ultimate consumer, and a supplier's remoteness from the ultimate consumer affects its ability to control quality and its image. Merchants who aspire to long-term success and who do not anticipate expropriation normally seek to generate repeated sales to the same customers or class of customers. If intervening levels of a distribution chain have the capacity to adversely affect quality or its image, a prudent merchant will attempt to minimize such exposure by limiting that capacity.

Excluding efforts to eliminate intermediaries by acquisition or otherwise, several applied antitrust problems flow from a supplier's interest in incentivizing others in the chain to move its goods or services without impeachment of its image. These include margin-oriented techniques, such as resale price maintenance and discrimination in price, and various nonprice restraints in addition to those dealt with in *Sylvania*. Suppliers' desire to maximize quality control (in the cause of promoting repeat sales,

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success is dubious because of built-in debasement of importers' currency, differing political aims among OPEC members, and the ability of major consumers to form a counterpart organization.

32. *See, e.g.*, European Common Market moves toward establishing a man-made fiber cartel. FORBES, November 1, 1977, at 120; CHEMICAL WEEK, October 26, 1977, at 28.

33. Sherman Act, 15 U.S.C. §§ 1-7 (1970); Clayton Act, 15 U.S.C. §§ 12-27 (1970).

minimizing products liability exposure, or satisfying regulatory requirements) at the level of the ultimate consumer by marketing through similarly-committed distributors or retailers has become a prominent predicate for various nonprice restraints. Such distributors or retailers may merely resell their suppliers' goods as such or reprocess them before sale. Suppliers, in the interest of encouraging resellers' investment oriented to maintain a quality image, or actual quality through assured service, and retarding price erosion, will consider definition of exclusive territories, minimal storage facilities, adequate handling or rehandling equipment and techniques, classes of sub-customers, complementary products or services, and minimum employee capacity. To the degree suppliers do so, they verge on various practices within the scope of antitrust regulation. These include exclusive dealing[34] and sales[35] arrangements, requirements contracts,[36] tying,[37] territorial confinement,[38] customer selection standards,[39] and site location limitations.[40]

While most of these restraints are typically considered to be conceived and imposed by suppliers, they need not all be. A contractor, wholesaler, or retailer may demand that its supplier refrain from either selling to competitors of the customer or marketing in an agreed territory or trade that will be exploited by such contractor, wholesaler, or retailer as a condition to its using or featuring the supplier's line.

B. *Vertically-Imposed Restraints*

Some of these practices are regarded with more suspicion than others. Thus, species of exclusive dealing, requirements contracts, and tying are covered by section 3 of the Clayton Act, which focuses *only* on restraints imposed by *suppliers* of *commodities* in context of probable deleterious effects on competition.[41] The Supreme Court deems tying by a supplier more heinous than exclusive dealing and requirements

34. Exclusive dealing comprises the commitment of a wholesaler, retailer, or commercial consumer to its supplier to stock or use only the product or service line that is made available by the supplier.

35. A supplier's commitment to a customer to supply a particular line to only that customer in a given territory or for a given trade constitutes an exclusive sales arrangement. The customer typically resells the goods with little reprocessing.

36. A commitment by a supplier or its customer to supply or take a substantial portion of its output or needs to or from the reciprocal function.

37. A commitment by a seller to provide or by a buyer to take a product or service from the other with the understanding that such a commitment is a prerequisite for access to another (and presumably scarcer) product or service.

38. Typically an undertaking by a customer or subcustomer to confine its resale activity to a defined territory.

39. Typically an undertaking by a customer or subcustomer to confine its resale activity to an agreed class of prospects that may be identified by trade, distribution level, or size. Conceivably, a comparable restraint could be imposed by a customer on a supplier.

40. An undertaking by a customer or subcustomer to confine its resale activity to an agreed location in the sense of a store, without necessary restriction on the location or class of its prospects for resale.

41. 15 U.S.C. § 14 (1970). Section 3 addresses the sale or lease of commodities only.

contracting, and thus, *in certain circumstances*,[42] tying has been characterized as offensive per se[43] to section 1 of the Sherman Act while the latter have not.[44] On the other hand, the Court has given FTC leave to condemn practices that fall short of either exclusive dealing or tying, but have the potential to mature into one of them.[45] Neither the Sherman Act nor the Federal Trade Commission Act (FTCA) is limited to commerce in *commodities* or to restraints imposed by suppliers as opposed to customers.

Exclusives exacted by customers of their suppliers are *not* addressed by the Clayton Act and, thus, are assessed under the Sherman Act,[46] although the ultimate effect of redundant exactions at the customer level may be comparable to horizontally-arranged territorial allocations characterized as offensive per se.[47] Exclusive selling arrangements, unlike classic territorial or customer allocation, do not *necessarily* preclude sales within a region by nonsuppliers who possess the product or service. Presumably, a consenting supplier has decided that its long-range interests are best served by limiting further exploitation of the trade or area. The selection of other customers is, therefore, calculated to minimize practicality of resale into the franchisee's territory without explicitly committing such other customers against resale. There is no guaranty against strong customers using this technique to control relatively weak suppliers, and there is no current remedy for such domination except through retrospective analyses appropriate to Sherman Act or FTC proceedings.

In contrast to "exclusive selling," "exclusive dealing" implies that a reseller or commercial consumer avoids use of products or services that compete with those bought from its supplier. Therefore, exclusive dealing may contravene the Clayton Act[48] or section 5 of FTCA[49] and is certainly subject to rule of reason analysis under section 1 of the Sherman Act. Exclusive selling and dealing are not contrary concepts and may be complementary as a matter of negotiation.

42. *See* notes 70-74 and accompanying text *infra*.

43. Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969), 429 U.S. 610 (1977); United States v. Loew's, Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

44. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

45. FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

46. Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

47. United States v. Topco Assoc. Inc., 405 U.S. 596, 608 (1972).

48. Section 3 of the Clayton Act reads on exclusive dealing, requirements contracts, or ties imposed by *sellers* or *lessors* of goods. 15 U.S.C. § 14 (1970). Buyers or lessees of goods, services, or realty are subject to regulation under the Sherman Act or section 5 of the Federal Trade Commission Act (FTCA), but their exclusion from Clayton Act coverage evidences society's lesser concern with the activities of a buyer. This is also true of the Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936), much of which (including a prohibition of buyer's *knowing* receipt of prohibited price discriminations) is embodied in § 2 of the Clayton Act, 15 U.S.C. § 13 (1970).

49. 15 U.S.C. § 45(a)(1) (1970).

While neither *Schwinn* nor *Sylvania* raised the issue of tying, it is another species of vertically-imposed nonprice restraint. In essence, tying is conditioning availability of a product or service upon the customer's taking another presumably less desirable product or service. While successful tying is clearly extortionate, exclusive dealing and total requirements contracting are not. Tying succeeds when the principal product or service is vital to the buyer and difficult or impossible to procure from another source. This is not necessarily true of exclusive dealing and total requirements contracting, although all can effect the same result of foreclosing competition in a product or service. Perhaps because of the "big business" image of defendants in the leading cases[50] and their immunity from Clayton Act prohibition by reason of its focus on commodities or perhaps because of its essentially coercive nature, tying has been treated rigorously under section 1 of the Sherman Act. With minor qualifications,[51] tying is offensive per se to the Sherman Act when the perpetrator uses *appreciable* market power over the tying product or service to foreclose a substantial volume of the market for the tied product.[52] In practice, tying is not contrary to exclusive selling or dealing, and the three could be encountered in any combination. Tying by a buyer, whether through coercive reciprocity or sheer buying power over a product or service for which supply exceeds demand, is quite conceivable and would be subject to sanctions under section 1 of the Sherman Act.[53]

Conceivably, exclusive selling, exclusive dealing, or tying arrangements could be accompanied by other restrictions on a party's conduct and each restraint would be part of the total analysis. For example, if the territory in an exclusive selling or dealing arrangement were loosely defined or within a densely populated area, the supplier could insist on limiting the site from which its exclusive seller operates or the buyer could seek to limit locations of the supplier's other nearby customers. Similarly, a franchisee might demand indemnity against infringement by competing customers of the supplier as the price for cultivating the

50. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); United States v. Loew's Inc., 371 U.S. 38 (1962); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

51. *See, e.g.*, United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 560-61 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (pioneering companies). Dehydrating Process Co. v. A.O. Smith Corp., 229 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961) (quality control).

52. Fortner Enterprises, Inc. v. United States Steel Corp., 429 U.S. 610 (1977).

53. Insistence on barter in kind, particularly when currency is suspect, is not tantamount to tying as prohibited by the Sherman Act. For an amazing suggestion that Justice Department personalities may have felt to the contrary, see CHEMICAL WEEK, May 1, 1974, at 11. Fortunately such suggestions are not always meaningful, particularly when a new head of the Antitrust Division feels it may be necessary to force each producer to set prices based on its own operating costs, which would mean that bigger, low-cost producers would be forced to undersell less economic producers. CHEMICAL WEEK, September 28, 1977, at 56.

territory. Profit pass-over or pass-along arrangements are examples of such indemnity.[54]

Vertically-imposed nonprice constraints thus fall into six categories: restraints on the territory to which a *supplier's* marketing efforts can be oriented; restraints on customers to which a *supplier's* efforts can be oriented; restraints on resource selection; restraints on territorial or sub-customer markets to which customers can orient themselves; restraints on customers' methods of doing business (including site selection); and theoretically non-restraining directory provisions such as designation of geographical areas or customer classes of primary responsibility.

Many customer and supplier-imposed restraints, such as exclusive selling, territorial or customer class confinement, limitations on the physical base of customers' commercial activities, and assignments of principal responsibility for discrete market sectors, ameliorate intrabrand competition[55] as an intended consequence of vigorously promoting interbrand competition at every level of a distribution chain. This is not true of tying or exclusive dealing, which seek to minimize interbrand competition and, therefore, fall within section 3 of the Clayton Act. This presumably indicates a greater continuing societal concern with artificial restraints on interbrand competition.

A significant purpose of the restraints on intrabrand competition is to assure front-line merchants that they can concentrate on developing demand for the product line without having to foster a market identity separate from their supplier. A principal effect of *Sylvania* is to evoke rational consideration under section 1 of the Sherman Act of practices that are obviously oriented to promoting systematic interbrand competition. In the absence of interbrand competition, such practices would be grist for either section 5 of FTCA or the monopolization provision of section 2 of the Sherman Act,[56] as served by *Alcoa* logic,[57] without need, in the case of FTC, for the excesses implicit in *S. & H.*[58] and *Brown Shoe II*.[59]

III. Section 1 of the Sherman Act

A. Rule of Reason

The Supreme Court provided an early guide for construing section 1. In orienting inferior courts to the practices that prompted adoption of the Act—power to fix prices, to limit production, and to effect a deterioration

54. Profit pass-over arrangements were permitted in the *Schwinn* and *Topco* decrees. *See* note 12 *supra*.

55. Intrabrand competition between marketers of goods or services occurs when they effect procurement for resale from a common supplier or operate under a common licensor, as opposed to "interbrand competition" in marketing substitutable goods or services originating from different resources.

56. 15 U.S.C. § 2 (1970).

57. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

58. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1973).

59. FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966).

in quality that is "the inevitable resultant of . . . monopolistic control over . . . production and sale"[60]—the Court observed that "freedom of the individual right to contract . . . was the essence of freedom from *undue* restraint on the right to contract."[61] From such language developed the central theme, known as the rule of reason, that the statutory purpose was to "preserve from *undue* restraint the free action of competition . . ."[62] and, ultimately, Brandeis' amplification that the

> true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. . . . [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint . . .; . . . nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, . . . reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[63]

The word "ordinarily" relates to judicial development of per se rules that are exceptional in nature and are oriented to particularized species of commercial conduct.

B. *Per Se Rules*

In theory, when a practice is stigmatized as unreasonable per se by the Court, defendants are precluded from arguing reasonability or inconsequence of the particular conduct. Ideally such characterizations come about "only after [the courts have] considerable experience with [the] business relationships" in question.[64] *Schwinn*, however, did not reflect the ideal.

After *Sylvania*, per se rules condemn price-fixing or stabilization in the horizontal or vertical array, horizontal territorial or customer allocations, horizontally-arranged production or marketing quotas, group boycotts, and *certain* tying arrangements. While it has been argued that pricing data exchanges between competitors are offensive per se by reason of *United States v. Container Corporation of America*, the concurring opinion disagreed with such characterization,[65] and the pre-

60. Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911).
61. *Id.* at 62 (emphasis added).
62. United States v. Union Pac. Ry., 226 U.S. 61, 87 (1912) (emphasis added).
63. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
64. United States v. Topco Assoc., Inc., 405 U.S. 596, 607 (1972).
65. United States v. Container Corp. of America, 393 U.S. 333, 338-39 (1969). Mere data exchange does not constitute a restraint, although it might provide a temptation or facilitate tacit agreement. The Antitrust Division has, however, expressed concern over *public* disclosure of price moves or their predicates. CHEMICAL WEEK, September 28, 1977, at 5. Such concern is more alarming than the practice it addresses. Thus far there is no commonly understood prohibition against voluntarily entertaining temptation, although tacit agreement to stabilize prices may violate § 1 of the Sherman Act. Hopefully the Court will resist inferring violation from parallelism or easy availability of data. Judge Weinstein in United States v. Kliegman Bros., Inc., (No. 76-CR-650 E.D.N.Y. August 19, 1977), recently reaffirmed that mere data exchanges followed by parallel conduct do not merit the per se

sent Court would be unlikely to include pricing data exchanges within the per se list. The inclusion of tying is interesting in several respects. Relegation of particular tying arrangements to the per se rule involves a series of quality considerations[66] unnecessary to the other per se labels. Furthermore, ties effected by pioneering companies and those seriously concerned with quality control have been remitted to the rule of reason,[67] presumably along with those imposed by a "failing company"[68] and companies suffering dramatic decline in their resource or market positions.[69]

Competitors' agreements to stabilize prices, divide territories, allocate customers, adopt production or marketing quotas, or refuse to deal with classes of or individual suppliers or customers offer clear analogies to monopoly structure. The purpose is immunization from free market forces. If participants in such agreements are an appreciable factor in the market-place, they will achieve a measure of the desired immunization and a reciprocal reduction of leverage otherwise available to those dealing with the collective or one of its members. Although the forbidden fruits of monopoly would not be fully achieved until competitors not involved in the agreement were unable to handle the supply or demand against which the agreement is arrayed, the collective possesses considerable potential to disrupt ordinary market mechanisms.

This analogy to monopoly is not suited to tying and resale price maintenance. The various species of conduct encompassed in "tying" cannot operate successfully unless the perpetrator has sufficient economic power to coerce others away from their normal pattern of reaching buy/sell decisions. Thus, theoretically, the power to tie proceeds from monopoly-like control over a vital good or service while horizontal arrangements that are per se unlawful tend to establish monopoly power. Tying endeavors should fail unless they proceed from real strength. Absent such strength, an attempt at tying can not seriously distort the market mechanism. The potential for broad-scale mischief in either tying or attempts at horizontal market-rigging justifies per se characterizations, although truly effective tying would seem to warrant prosecution under section 2 of the Sherman Act.

Resale price maintenance raises different considerations. It does not necessarily proceed from a monopoly-like position and does not tend

label. Perhaps a "mental state" test similar to that articulated in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), should be a prerequisite to the conclusion that data exchanges and parallel conduct are more indicative of collusive stabilization than vigorous competition.

66. Fortner Enterprises, Inc. v. United States Steel Corp., 429 U.S. 610 (1977).

67. Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir), *cert. denied*, 368 U.S. 931 (1961).

68. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

69. In a related context, see dicta in United States v. General Dynamics Corp., 415 U.S. 486, 503-04 (1974), about horizontal-level acquisition of a mineral company with resources limited to existing commitments.

toward monopoly if effective competition exists at the resale level. Indeed, in the *Dr. Miles* decision,[70] the Supreme Court, although it indulged in language suggestive of the *Schwinn* majority's fascination with restraints on alienation, condemned maintenance of minimum resale prices by analogizing to the market evils in horizontally-arranged price-fixing:

> [Dr. Miles] can fare no better with its plan . . . than could the dealers themselves *if* they formed a combination and endeavored to establish the same restrictions, and to thus achieve the same result, by agreement with each other. . . . [C]ombinations between dealers, having for their *sole* purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.[71]

Clearly, such a horizontal arrangement would minimize or eliminate leverage for those who are compelled to deal with combining merchants, and such market-rigging is condemned regardless of whether it successfully produces the effect of monopoly. The most successful resale price maintenance program will not, however, produce a monopoly effect as long as the supplier has competitors. To this extent, vertically-imposed resale price maintenance programs differ essentially from other species of commercial conduct sharing the per se stigma.

Before the demise of the statutory exceptions for fair-trading[72] it was argued that licit minimum resale price maintenance had the effect of maintaining higher prices to consumers even in the presence of competing goods.[73] This assertion does not justify attributing a tendency toward monopoly effect to *minimum* resale price maintenance and is an insufficient reason for stigmatizing *maximum* resale price maintenance, which shares the per se characterization.[74] In *Albrecht v. Herald Co.*,[75] Justice White wrote for the majority that "schemes to fix maximum prices, . . . *may* severly intrude upon the ability of buyers to compete and survive [in that the prices] *may* be . . . too low for the dealer to furnish services essential" to its competitive struggle.[76] This possibility presupposes a somewhat suicidal supplier and ignores the obvious purpose to protect the broad image of the product or service from the dealer who is tempted to extort high prices from his customers. Justice White also noted that pre-set maxima "may channel distribution through a few large or specifically

70. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

71. *Id.* at 408.

72. The Miller-Tydings Act, 50 Stat. 693 (1937), and the McGuire Act, 66 Stat. 632 (1952), were repealed effective March 11, 1976. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975), amending 15 U.S.C. § 45(a).

73. *Hearings on S. 408 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 174 (1975).

74. Before the Supreme Court's reversal of Albrecht v. Herald Co., 390 U.S. 145 (1968), the Eighth Circuit recognized social values in maintenance of maximum resale prices. 367 F.2d 517, 522 (8th Cir. 1966).

75. 390 U.S. 145 (1968).

76. *Id.* at 152-53 (emphasis supplied).

advantaged dealers . . . otherwise subject to significant nonprice competition."[77] But this possibility is countered by the reality that small dealers are often under price-cutting pressure from more advantaged competitors. The probable nub of the holding was a *fear* that overt maintenance of maxima may develop into a vehicle for covertly maintaining minima.[78]

Arguments favoring rule of reason analysis of vertically-imposed resale price maintenance are similar to those favoring such analysis of vertical confinements on territories or customer classes. Some were recognized in the *Albrecht* decision:

> As a theoretical matter, it is not difficult to conceive of situations in which [suppliers] would rightly regard *minimum* resale price maintenance to be in their interest. Maintaining [minima] would benefit [suppliers] *when* the total *demand* for their product *would not be increased* as much *by* the *lower prices* brought about by dealer competition *as by some other nonprice, demand-creating activity*.[79]

It is evident that effective *minimum* resale price maintenance may restrict the lower-margined reseller from passing the benefit of such efficiency to its customers and prevents another reseller from deliberately labeling a product as a loss-leader to attract traffic.[80] It does not, however, retard nonprice competition of price-fixed products in terms of credit, delivery, or subsequent service or price competition of other products. While it can be argued that minimum resale price maintenance hinders ability to meet a lower price on a competing brand, this is meaningful to the constrained merchant only in the rare instance when he is *unable* to carry more than one brand.

IV. White to Schwinn to Sylvania

A. Nonprice Restraints on Customers' Resale Activities

1. Motivations.—Suppliers frequently wish to retain some control over nonprice aspects of redistribution of a product or service for reasons both related and unrelated to the effect on price.

A satisfied consumer enhances the manufacturer's image and leads to more sales. Consumer satisfaction may require a network of service centers and maintenance of bulky inventories and a staff of trained personnel, all of which demand investment by the supplier or some other element in the market place. If the investment has a projected small return, the supplier may be compelled to make the investment or procure another to do so in support of the basic and, presumably, higher-margined marketing effort.

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77. *Id.* at 153.

78. *Id.*

79. *Id.* at 151 n.7 (emphasis added).

80. An unpressed merchant's intentional incurrence of losses on a given product or service may be considered antisocial. *See* Section 3 of the Robinson-Patman Act, 49 Stat. 1526, § 3 (1936) (codified at 15 U.S.C. § 13a (1970)).

Numerous conditions, including community image and state taxation, may motivate a supplier to find local merchants who will undertake low mark-up servicing in return for the opportunity to market high mark-up goods. The retailer, however, will not continue to provide service if another dealer, who has avoided such investment, may routinely dump the product in the service area. Thus, regardless of resale price maintenance, remote suppliers in myriad situations wish to control various features of intermediate distribution in their never-ending race for consumer favor.

2. *White Motor Co. v. United States*.—Before *Schwinn*, the leading decision concerning vertically-imposed limitations on territories and customer-selection was *White Motor Co. v. United States*.[81] In *White* a minor participant in the automotive industry marketed its trucks and replacement parts through wholesale distributors who sold to retailers and consumers and also directly to selected retailers and substantial consumers. The manufacturer limited resale to designated territories and customers and also implemented a resale price maintenance program.[82] Customers reserved to the manufacturer included federal and state governments and "national" or "fleet" commercial users.[83] The price maintenance program was dual in nature: distirbutors were bound to offer the same prices to their retailer customers that the manufacturer charged to its direct-buying retailers; distributors and dealers were obligated to respect discount schedules set by the manufacturer for *parts* sold to governmental, national, and fleet accounts.[84]

The manufacturer argued that the territorial confinements were essential to its distribution chain in the contest against larger automotive marketers and that customer selection constraints were imperative for equal treatment of large customers whose patronage was indispensable to the manufacturer. At the trial, the government was awarded summary judgment on the price-fixing and confinement issues because both practices were offensive per se to section 1 of the Sherman Act.[85] White Motor appealed *only* from that part of the ruling prohibiting the limitations on territory and customer-selection.[86] By dropping wholesalers from its distribution system,[87] the company implicitly admitted illegality of the price-fixing.

Justice Douglas, writing for the majority, noted that *White Motor* was the "first case involving a territorial restriction in a *vertical* arrange-

81. 372 U.S. 253 (1963).
82. *Id*. at 255-57.
83. *Id*. at 257.
84. *Id*. at 260.
85. 194 F. Supp. 562 (N.D. Ohio 1961).
86. 372 U.S. at 256 n.2. Note the holding in United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944), that restrictions ancillary to price-fixing share its condemnation when they are "an *integral* part of the whole distribution system." (emphasis added).
87. 80 ANTITRUST & TRADE REG. REP. (BNA) at 1-A (1/22/63).

ment" to come before the Supreme Court[88] and disclaimed competence, because of the record, to decide whether the price-fixing tainted the other restrictions.[89] The Court concluded it knew "too little of the actual impact of both [the territorial constraint] and the one respecting customers to reach a conclusion on the bare bones" of the record that they were offensive to Sherman Act principles.[90] In contrast to horizontal arrangements that are "naked restraints . . . with no purpose except stifling of competition,"[91] Justice Douglas observed that a vertical restraint

> may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction *or* they may be allowable protections against aggressive competitors *or* the only practicable means a small company has for breaking into or staying in business [citations omitted] and within the 'rule of reason.' We need to know more . . . about the actual impact . . . on competition to decide whether they . . . [citing *Northern Pacific*] . . . should be classified as *per se* violations.[92]

Consequently, "a trial rather than the use of summary judgment [was] necessary."[93] Significantly, the Court suggested consideration of the standard used in testing acquisitions under section 7 of the Clayton Act.[94] The case was ultimately terminated by consent decree.[95]

Justice Brennan's concurring opinion in *White Motor* is noteworthy for the observation that customer-selection restraints are "inherently the more dangerous [than territorial limitations since cordoning off customers serves] to suppress all competition between [supplier] and distributors,"[96] but territorial constraints may "foster a vigorous inter-brand competition which might otherwise be absent."[97] Why multi-level intrabrand competition is preferable to such competition at an intermediate level was not explained. Justice Brennan indicated, however, that he would look more favorably on territorial restraints imposed on unwilling dealers by their suppliers' *selfish* interests. Evidence of such a condition would be instrumental in rebutting a theory that the vertical form disguised a horizontal agreement at the dealer level, but it would also suggest power that is unavailable to the weak supplier.

It is also appropriate to note the FTC experience in *Snap-On*[98] and *Sandura*,[99] which predate the judicial excess implicit in the *S. & H.*

88. 372 U.S. at 261 (emphasis in original).
89. *Id.* at 260.
90. *Id.* at 261.
91. *Id.* at 263.
92. *Id.* (emphasis added).
93. *Id.* at 264.
94. 15 U.S.C. § 18 (1970).
95. [1964] TRADE CAS. (CCH) ¶ 71,195 (N.D. Ohio 1964).
96. White Motor Co. v. United States, 372 U.S. 253, 272 (1963).
97. *Id.* at 268.
98. Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).
99. Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964).

decision.[100] Although *Snap-On* and *Sandura* litigated the status *under FTCA* of vertically-imposed nonprice restraints, the holdings are fairly cited for the proposition that vertically-imposed territorial constraints were not offensive per se to the Sherman Act. Other decisions suggest that the sweep of FTC power is sufficiently broad that marketers should continue to be very aware of it even when confident that Sherman and Clayton Act standards are observed.[101]

In *Snap-On*, FTC ordered respondent to cease fixing the resale price of its product, setting territorial limits within which its customers could resell, excluding such customers from reselling to certain accounts, and exacting noncompetition agreements effective after termination of the supplier-dealer relationship.[102] The rationale for the Commission's action was that the enumerated practices constituted a single system aimed at preventing intrabrand competition.[103] Snap-On was one of more than eighty firms engaged in "bitter and bloody" competition.[104] While its dealers were precluded from soliciting buyers outside their territories, there were no restrictions within the territory.[105] The Seventh Circuit recognized that promotion of interbrand competition was vital, stating that

> manufacturers should be encouraged by the workings of the antitrust laws to meet and promote competition of their products with those of competing brands, rather than . . . hampered by those laws in the 'orderly marketing of [their] products.'[106]

In *Sandura*, the Sixth Circuit dealt with a small floor-covering manufacturer who possessed 4.8% of a market in which the three lead manufacturers controlled about eighty percent of industry assets and dominated the market-place.[107] While respondent in the underlying FTC proceeding was not a "failing company," it had been exposed to the threat of bankruptcy because of product failure.[108] To retain distributors it granted exclusive territories to dealers who would provide regional ware-

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100. FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

101. FTC "does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." *Id.* at 244. The Court did not define "public values" except by dicta addressing whether a practice

> without necessarily having been previously considered unlawful, offends public policy as . . . established by statutes, the common law, or *otherwise*—whether, in other words, it is within at least the penumbra of some . . . established concept of unfairness; . . . whether it is immoral, unethical, oppressive, or unscrupulous. . . .

Id. at 244-45 n.5.

102. Snap-On Tools Corp. v. FTC, 321 F.2d 825, 827 n.2 (7th Cir. 1963).

103. *Id.* at 830.

104. *Id.* at 833.

105. *Id.* at 832.

106. *Id.* at 833.

107. Sandura Co. v. FTC, 339 F.2d 847, 852 (6th Cir. 1964).

108. *Id.* at 856.

housing, maintain inventory, and advertise. Dealers testified that they would not have taken Sandura on without the exclusivity.[109] The Sixth Circuit held that the territorial exclusivity increased "interbrand competition without . . . detriment to intrabrand competition,"[110] after having found that both implementation *and continuation* of the system was justified by competition at Sandura's level, that no practical but less restrictive alternatives[111] were available, and that elimination of intrabrand competition was justified by the interbrand effort, although arguably "significant product differentiation" would increase the importance of intrabrand competition.[112]

Although not intended as an exclusive benchmark, the Sixth Circuit's reasoning would be pertinent to a "rule of reason" inquiry. The government's failure to seek overturn of either *Snap-On* or *Sandura* gave tacit testimony to an official and informed conclusion that vertically-imposed nonprice restraints can be tested under the rule of reason without violence to societal norms and objectives.[113] *Schwinn* emerged from the trial court[114] as *Sandura* was being decided.[115]

3. The Schwinn Case.—Schwinn, characterized by the trial court as "a pygmy, compared to its giant bicycle competitors, Sears . . . and Montgomery Ward,"[116] was charged with franchising a limited number of retailers who were obligated to procure the product from wholesalers authorized for their respective areas by Schwinn; observe retail prices fixed by Schwinn; refrain from reselling Schwinn products to nonauthorized retailers; and refrain from marketing Schwinn products at locations where they were not franchised.[117] The government also alleged that Schwinn conspired with wholesale distributors to allocate exclusive territories among such distributors; confined such distributors to the territories assigned; confined their sale of Schwinn products to only franchised dealers; and conspired with such distributors to boycott unauthorized accounts or those that failed to respect Schwinn's retail price maintenance.[118] Schwinn franchisees were free, however, to carry other brands of bikes and parts.[119]

109. *Id.*
110. *Id.* at 858.
111. Possible alternatives would have included "primary-area-of-responsibility" arrangements that rely on a dealer's obligation to exert best efforts in its territory to preclude its invasion of another.
112. *Id.* at 857.
113. Handler, *Recent Antitrust Developments*, 40 N.Y.U. L. Rev. 823, 845-51 (1965).
114. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323 (N.D. Ill. 1965).
115. The Sixth Circuit's decision in *Sandura* is dated December 30, 1964. The district court's opinion in *Schwinn* is dated January 25, 1965).
116. United States v. Arnold, Schwinn & Co., 237 F. Supp. 323, 334 (N.D. Ill. 1965).
117. *Id.* at 325.
118. *Id.*
119. *Id.* at 335.

The district court found that defendant had not engaged in price-fixing, held that agreements between Schwinn and wholesalers and retailers to restrict sales to allocated territories were offensive per se, and, in effect, sanctioned Schwinn's other constraints on distribution that were not the result of horizontal agreements on either the distributor or retailer level.[120]

The rule of reason, characterized as "the rule of common law that generally what one may do himself he may likewise do by or through an agent,"[121] insulated transactions in which Schwinn distributors enjoyed agent or consignee status, the confinement of distributors' resales to franchised dealers, and the restriction against resales to nonfranchisees or from unauthorized locations.[122] The court was satisfied that adequate localized service and repair facilities were "an absolute essential for any bicycle manufacturing company."[123] The court also affirmed that distributor-level territorial constraints would have been permissible had Schwinn not slipped into a pattern of participating with distributors in the definition of territories.[124]

The government appealed from the district court's decision. Schwinn did not. The government contended that the ultimate decree should prohibit Schwinn from imposing territorial and customer-selection constraints on all distributors including those who were supposedly its agents or consignees and that Schwinn's prohibitions against sale to nonfranchised dealers *unreasonably* restrained trade.[125] The Justice Department did not request that the customer-selection limitations be characterized as offensive per se[126] and made no great issue of the retailer-location limitation.[127] On the contrary, it argued for "a standard of presumptive illegality" that would have imposed on the defendant the burden of establishing a procompetitive justification for nonprice

120. *Id.* at 342-43.
121. *Id.* at 334.
122. *Id.* at 334-35.
123. *Id.* at 338.
124. *Id.* at 342.
125. Brief for Appellant at 2, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
126. *Id.* at 22. During oral argument counsel for the government, in response to a specific question from the bench, denied an ambition to achieve a per se rule, 35 U.S.L.W. 3373 (1967). Because *White Motor* had recently rejected per se characterization of a supplier's restraint on its customers' territorial operation and customer selection, *even though they coexisted with illegal resale price maintenance*, the government would have been hesitant to seek a per se characterization for essentially the same non-price restriction *in the absence of price-fixing*. For a different viewpoint, see remarks of the Hon. Donald H. Turner, then Assistant Attorney General in charge of the Antitrust Division, in a panel discussion captioned *Orderly Marketing, Franchising and Trademark Licensing: Have They Been Rented by Schwinn and Sealy?*, 1968 N.Y. State Bar Ass'n Antitrust Law Symposium, 30-31 (CCH 1968).
127. Brief for Appellant at 25, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

constraints on distributors' and retailers' marketing methods.[128] The government also argued that the record established lack of justification to avoid the possibility of a new trial.[129]

The majority opinion was remarkable in many respects.[130] Relying on the "ancient rule against restraints on alienation,"[131] Justice Fortas announced that a supplier's post-sale effort "to restrict territory or persons to whom the product may be transferred . . . is a *per se* violation . . . ."[132] Since the status of territorial constraints on resales was not before the Court, this allusion to territorial confinement was dictum.[133] He incorrectly credited the trial court with holding that "where a manufacturer *sells* products . . . subject to territorial restrictions upon resale, a *per se* violation . . . results"[134] when the decision below had actually applied the per se rule to the product of *horizontal* combination.[135] The Court exceeded the requested relief by characterizing certain vertically-imposed nonprice restraints on resale as unlawful per se and condemning territorial confinements on resale that were not before it and that, in the estimation of Justice Brennan (concurring in *White Motor*), were less fearful than customer-selection restraints.[136]

The opinion was not totally in the government's favor because the Court remitted comparable constraints on consignees to rule of reason analysis. This was consistent with the Court's improbable concern for common-law rules[137] or, as described by the Justice Department, *notions*[138] disfavoring restraints on alienation. The *Schwinn* decision also acknowledged defendant's argument that a disciplined distribution system was necessary to meet powerful competition at the manufacturing and retail levels.[139] This aspect acquires added significance after *Sylvania*. The most remarkable result of *Schwinn* was the Court's simul-

128. *Id.* at 41. At an FBA-BNA briefing conference in November 1977, E. Perry Johnson, FTC Bureau of Competition Assistant Director for Regional Operations, is said to have suggested the promulgation of a Trade Regulation Rule addressing vertically-imposed nonprice restraints that would use the presumptive illegality device. 838 ANTITRUST & TRADE REG. REP. 1-A (BNA).

129. *Id.*

130. *See* notes 10-17 and accompanying text *supra*.

131. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 380 (1967). The Government's brief made passing references to the "policy of the common law against a seller's imposing a restraint on alienation by the purchaser" and such "notions of policy deeply rooted in the common law." Brief for Appellant at 26-27, 39, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Note that, in Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911), the Court also advanced such a theory, although the holding seemed motivated by a speculative analogy to horizontally-arranged price-fixing. *Id.* at 407-08.

132. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

133. United States v. Topco Assoc., Inc., 405 U.S. 596, 617 (1972).

134. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).

135. 237 F. Supp. at 342.

136. White Motor Co. v. United States, 372 U.S. 253, 272 (1963).

137. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 378 (1967).

138. Brief for Appellant at 26, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

139. 388 U.S. at 376, 380.

taneous creation of a per se rule and the qualification that its application was contingent on a "conclusion" that defendant-supplier had been "firm and resolute" in enforcing territorial or customer-selection constraints on resale.[140] The "firm and resolute" language was lifted from a district court finding benign to defendant.[141] Justice Fortas' citation of *White Motor* as authority for rule of reason analysis for newcomers to an industry and failing companies may have been intended as a further qualification.[142] Within the context of the opinion, the language about "firm and resolute" enforcement, newcomers, and near-failures came *before* announcement of the *Schwinn* per se rule and may have been intended as a general background to the decision. Later cases, however, used such passages as justification for avoiding the per se rule when the defendant was not a newcomer, nor in dire straits, nor less than "firm and resolute" in enforcing vertically-imposed restraints.[143]

Before commenting on such decisions, it is appropriate to note the ultimate orders in *Schwinn* and in a subsequent case involving horizontally-arranged territorial allocations. In *Schwinn*, the district court ordered[144] co-defendants, the bicycle manufacturer and an association of its distributors, to refrain from limiting "the freedom of any distributor or retailer of Schwinn products *as to where and to whom* it may resell such products . . . ." The court, however, indicated that the manufacturer could licitly create or maintain "territories of prime responsibility for . . . distributors" or designate "in its retailer franchise agreements *the location of* the . . . *places of business* for which the franchise is issued . . . ."[145] In the later *Topco*[146] case, the Supreme Court condemned horizontal territorial allocation among retailers who were related vertically to a common supplier and trademark licensor as unlawful per se. Thereafter, the order fashioned by the district court permitted creation of areas of prime responsibility, *designation of a site at which the trademark in question could be used*, and profit pass-overs as the price of invading another's area.[147] This order was more significant than that in *Schwinn* because it was attacked unsuccessfully by the government.[148]

4. *Post Schwinn*.—In the wake of the *Schwinn* decision, the Third Circuit devised a fascinating means to avoid the newly-minted per se characterization in *Tripoli Co. v. Wella*.[149] Defendant Wella contended

140. *Id*. at 372.
141. 237 F. Supp. at 342.
142. 388 U.S. at 374.
143. *See* notes 149-62 and accompanying text *infra*.
144. The order was vacated and the underlying action dismissed on December 14, 1977. 845 ANTITRUST & TRADE REG. REP. (BNA) 28 A.
145. 291 F. Supp. at 565-66 (emphasis added).
146. United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).
147. [1973-1] TRADE CAS. (CCH) ¶ 74,391, as modified at ¶ 74,485 (N.D. Ill. 1973).
148. 414 U.S. 801 (1973).
149. Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

that physical danger to the uninitiated justified limitation of distributors' resales of its cosmetic lines to beauticians and barbers. Despite a long relationship, Wella terminated Tripoli's distributorship when it discovered the latter's sales to the public. Tripoli sued, and the trial court's grant of defendant's motion for summary judgment implied a rejection of a per se characterization of the constraints on Tripoli's resales.[150]

On appeal, the Third Circuit noted that "not all restraints in . . . distribution fall into the *per se* category"[151] and that restraints by "which a manufacturer may exercise responsibility to the consumer,"[152] must be tested by a "standard of reasonableness."[153] In *Schwinn* Justice Fortas had used a simple phrase in one of his formulations: "it is unreasonable *without more* for a manufacturer to . . . restrict and confine areas or persons with whom an article may be traded."[154] Although use of "without more" seemingly meant that per se characterization was appropriate without need to adduce more evidence of antisocial purpose or effect, the Third Circuit applied a different construction with the pronouncement that "there is more [in *Wella*] and the restraints are of a different order"[155] from those in *Schwinn*. Given the dangers to an uninitiated user and use of warning labels on Wella products, the Third Circuit concluded that Wella had a "lawful main purpose, to which the restriction on resale of potentially dangerous products is reasonably ancillary."[156]

In retrospect, *Wella* can be viewed as a reaction to the unreasoning sweep of *Schwinn*. A suggestion that the antitrust division shared the *Wella* court's reaction is apparent in a 1969 consent decree that excepted cases in which unrestricted resale would endanger "health or safety" of animals or plants[157] from a general ban on customer selection constraints.

An unlikely court indicated another means to avoid *Schwinn*.[158] Carter-Wallace sued the government for alleged infringement of a drug patent, and, by way of affirmative defense, the government charged Carter-Wallace with patent misuse because of resale restrictions imposed on two of its customers. The two customers bought the drug for use limited to producing other materials at a price lower than that charged to customers who were not restricted in use.[159] The court of claims cited *Wella* for the proposition that *Schwinn* "did not automatically outlaw

150. Tripoli Co. v. Wella Corp., 286 F. Supp. 264 (E.D. Pa. 1968).
151. Tripoli Co. v. Wella Corp., 425 F.2d 932, 936 (3d Cir. 1970).
152. *Id.* at 936 n.3.
153. *Id.* at 936.
154. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 (1967).
155. Tripoli Co. V. Wella Corp., 425 F.2d 932, 936 (3d Cir. 1970).
156. *Id.* at 938.
157. United States v. Farbenfabriken Bayer A.G. and Chemagro Corp., [1969] TRADE CAS. (CCH) ¶ 72,918 (D.D.C. 1969).
158. Carter-Wallace, Inc. v. United States, 449 F.2d 1374 (Ct. Cl. 1971).
159. *Id.* at 1378.

any and all post-sale restrictions."[160] Because the two customers who enjoyed the favorable price could elude any restraint on subsequent use of the product by paying *a not unreasonably* higher price for it and such a situation was not within the *Schwinn* scenario, the court thought it entirely appropriate to subject the constraint to rule of reason analysis.[161]

Another way of living with *Schwinn* was to require proof of "firm and resolute" enforcement[162] of vertically-imposed restraints. Thus, the apparent point in narrowly construing the application of the *Schwinn* per se rule was to support those who would limit its scope to *actual* restraints.

While product safety, quality control, and failure to enforce punctured the applicability of the *Schwinn* rule, the decision itself left various practices open to rule of reason analysis. Justice Fortas had avoided discussion of the propriety of territorial restrictions imposed on sales by patent licensees.[163] This was construed as a signal authorizing continued rule of reason analysis for territorial restraints explicit in not only patent,[164] but also trademark[165] and tradename[166] licensing.

In contrast to the reticence about restraints upon patent licensees, the *Schwinn* court sanctioned definition of exclusive sales territories uncontaminated by restraints on franchisees' resales.[167] Thereafter, lower courts sustained vertically-imposed definition of areas of dealers' primary responsibility for exploitation,[168] obligations to pass along profit attributable to invasion of another's territory,[169] and limitation to specific loca-

160. *Id.* at 1380.

161. *Id.* at 1381.

162. Reed Bros. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976); Redd v. Shell Oil, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); Good Inv. Promotion, Inc. v. Corning Glass Works, 493 F.2d 891, 893 (6th Cir. 1974); Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968); Todhunter-Mitchell & Co. v. Anheuser-Busch Co., 375 F. Supp. 610, 625-26 (E.D. Pa. 1974); In Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975), the circuit court rejected a quality-control justification for restraints because they were ancillary to an illegal resale price-fixing scheme and remanded the case for the further presentation of evidence to support the allegations involving section 1 of the Sherman Act. 506 F.2d 934 (1975).

163. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379 n.6 (1967). This does not suggest that licensors can constrain sales throughout the distribution chain; a constraint can be imposed only on the licensee's sale. Adams v. Burke, 84 U.S. 453 (1873).

164. *See, e.g.*, Dunlap Co. v. Kelsey-Hayes Co., 484 F.2d 407 (6th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

165. Tomac, Inc. v. Coca-Cola Co., 418 F. Supp. 359 (C.D. Cal. 1976).

166. Edwin K. Williams & Co.-East, Inc. v. Edwin K. Williams & Co., Inc., 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2973 (1977).

167. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967).

168. Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976).

169. Superior Bedding Co. v. Serta Assoc., Inc., 353 F. Supp. 1143 (N.D. Ill. 1972). Although the ultimate order in United States v. Topco Assoc., Inc., 405 U.S. 596 (1972), permitted profit pass-overs, it is difficult to imagine a more effective restraint on resale and intrabrand competition. If a dealer's profit from a sale in another's territory is extracted, the remitting dealer becomes, in effect, the agent of the payee, since any sales in the payee's territory are for its benefit and not the literal reseller's. In terms of excluding consumers

tions.[170] The last was grist for the *Sylvania* mill.

5. Sylvania.—Although location restrictions had been part of the *Schwinn* pattern,[171] they were permitted by the ultimate order.[172] In 1974, however, a panel of the Ninth Circuit held that restricting the location from which resale activities could be undertaken was unlawful per se under the *Schwinn* formulae.[173] Although the decision was reversed on rehearing,[174] the majority opinion placed a gloss on *Schwinn* by commenting that the *Schwinn* rule should not be applied "too literally, without sufficient reference to the textual context . . . or the facts from which Schwinn arose."[175] The essence of *Schwinn* related to *preclusion* of resales rather than to the mechanics of *fostering* resales.

In *Continental T.V. Inc. v. GTE Sylvania, Inc.*,[176] a manufacturer of television receiving sets, Sylvania, implemented a new marketing strategy to improve its national market share. In three years it successfully increased its share from less than two percent to approximately five percent. The strategy included discontinuing wholesalers and reducing the gross number of retailer relationships in favor of dealing directly with retailers who were recruited for their competence and aggressiveness. Retailers were committed to sell Sylvania sets only from approved locations. Sylvania, however, neither gave nor exacted exclusives from retailers and it retained the right to add retailers in any area.[177]

Dissatisfied with its 2.5% share of the area market in San Francisco, Sylvania added another dealer at a location about a mile from Continental, an existing dealer. When Continental's protest over this added intrabrand competition failed, it cancelled a large order for Sylvania sets. Continental, which had been refused status as a Sylvania retailer in Sacremento, where the manufacturer already enjoyed a fifteen percent market share, advised that it was moving an inventory of Sylvania sets to a new Sacremento location and relations disintegrated rapidly. Sylvania cut Continental's credit line by eighty-five percent; Continental withheld payments due Sylvania's factor; Sylvania terminated Continental; the

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from the supposed benefits of intrabrand competition, is this not equivalent to confining resellers to defined territories? One district court has suggested that an overly generous calculation of "profit" to be passed along would convert the entire arrangement into a prohibited territorial restraint. Superior Bedding Co. v. Serta Assoc., Inc., 353 F. Supp. 1143, 1150-51 (N.D. Ill. 1972). In effect, substantial profit pass-alongs are an indirect route to achieve the same result as vertically-imposed territorial constraints.

170. Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975); Sheldon Pontiac v. Pontiac Motor Div., 418 F. Supp. 1024 (D.N.J. 1976); Kaiser v. General Motors Corp., 396 F. Supp. 33 (E.D. Pa. 1975).

171. *See, e.g.*, Brief for Appellant at 10, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

172. United States v. Arnold, Schwinn & Co., 291 F. Supp. 564, 565-66 (N.D. Ill. 1968).

173. GTE Sylvania Inc. v. Continental TV, Inc., 537 F.2d 980, 982 n.1 (9th Cir. 1976).

174. *Id.*

175. *Id.* at 989.

176. 97 S. Ct. 2549 (1977).

177. *Id.* at 2552.

factor sued on the receivables; and Continental cross-claimed, alleging a location constraint violative of the Sherman Act that was also part of a price-fixing scheme.[178]

At trial, the court refused to instruct the jury on the application of the rule of reason to location restrictions. Rather, it charged that if the jury found an agreement between Sylvania and a dealer under which the manufacturer "exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, [they] must find any effort thereafter to restrict outlets or store locations from which . . . dealers resold . . . [to be violative] . . . regardless of the *reasonableness of the location restrictions*."[179] Although the price-fixing and other counts were rejected, this instruction led to a finding against Sylvania on the location constraints.[180]

Justice Powell, writing for the majority of the Supreme Court, commented that the Court had never "given *plenary* consideration to . . . the proper antitrust analysis of location restrictions."[181] While he noted circuit court decisions favoring such restrictions,[182] he ignored the Court's refusal to review the *Topco* order[183] and proceeded to discuss *Schwinn*. Focusing on Justice Fortas' direction that the *Schwinn* decree should enjoin understandings limiting "the retailer's freedom as to where and *to whom* it will resell,"[184] Justice Powell concluded, "In intent and competitive impact, the retail customer restriction in *Schwinn* is indistinguishable from the location restriction in [Sylvania]."[185]

Unfortunately there is no clear index of how the present Court deduced that the "intent and competitive impact" of restrictions on the location where remarketing is based so change the essential nature of the restraint that it can be equated with those limiting *to whom* sales can be made. "Without more," mere site restrictions and literal preclusion from customer groups cannot be equated unless one presupposes that the site-restricted merchant is also foreclosed from media access, other techniques for procuring orders from remote parts, and delivery systems. This is particularly true in metropolitan settings where the undifferentiated mass of potential customers can be attracted by numerous competitors using available media, stressing accessibility, availability of parking facilities, or easy credit arrangements. Justice Powell noted that *Schwinn* had involved location constraints, but the point of his reference is unclear since the transition to equating Sylvania's location restraints with the

178. *Id.* at 2553 n.9.
179. *Id.* at 2553.
180. *Id.* at 2553 n.9.
181. *Id.* at 2554 n.11 (emphasis added).
182. *Id.*
183. On the meaningfulness of certiorari denials, see Sunal v. Large, 332 U.S. 174 (1947).
184. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2555, (1977).
185. *Id.* at 2556.

customer-selection restraints condemned in *Schwinn* is made via *Schwinn*'s analysis of prohibitions against supplying "nonfranchised retailers."[186]

While the *Sylvania* opinion attempts to illuminate the equation by observing that "[i]n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired"[187] and that it is irrelevant to antitrust analysis that the focus of one "was addressed to territory and the other to customers,"[188] this merely juxtaposes a truism with a mischaracterization of Sylvania's limitation. Sylvania's dealers were certainly limited in location of their base, but this limitation did not preclude sales into any territory they could exploit from the approved base. This is very different from prohibiting Continental's sales to customers located outside of San Francisco. Justice Powell, in a later part of the *Sylvania* opinion,[189] recognized that constraints imposed by location restrictions are "practical" in nature, but this underscores rather than relieves concern over the equation of restraint mechanisms condemned by *Schwinn* with those at issue in *Sylvania* by reference to "intent" and "impact."[190]

Having discovered equivalency of location and customer-selection constraints, the Court then considered the propriety of *Schwinn*. Justice Powell properly commented on *Schwinn*'s failure to refer to *Northern Pacific*'s description of practices meriting the per se stigma[191] and then proceeded to an excellent review of socio-economic questions implicit in vertically-imposed restraints, various views proposed about them, and the internal illogic of the *Schwinn* opinion.[192] Indeed, assuming the validity of the explicit predicate for reexamining *Schwinn*, his commentary is marred only by employing the *absence* of legislative history to prove a point inductively, a technique glaringly prominent in the majority opinion of *Ernst & Ernst v. Hochfelder*,[193] which he also authored. Fortunately, in *Sylvania* the absence of legislative history is assigned a minor role in dicta.[194]

Ultimately, the opinion recognized that reduction of intrabrand competition may be a necessary and even desirable price of promoting

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186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 2560.
190. *Id.* at 2556.
191. *Id.* at 2558.
192. *Id.* at 2561-62.
193. 425 U.S. 185, 196 nn. 14, 15.
194. For example, repeal of the McGuire and Miller-Tydings Acts is cited in a footnote as evidence of congressional approval of "per se analysis of vertical price restrictions" as contrasted with the lack of "similar expression of congressional intent . . . for nonprice restrictions." Continental TV, Inc. v. GTE Sylvania, Inc., 97 S. Ct. 2459, 2558-59 n.18 (1977). That nonprice vertical restraints have never been the beneficiaries of anything comparable to the qualified blessing afforded resale price maintenance by the late McGuire and Miller-Tydings Acts should be obvious.

"certain efficiencies" concomitant with promoting interbrand competition.[195] Consequently, Justice Powell announced *reversion* to the "standard articulated in *Northern Pac. R. Co.* and reiterated in *White Motor*."[196] This standard demands inquiry into the reason for and impact of vertically-imposed nonprice restraints to determine whether they are pernicious in effect or without redeeming virtue.[197] The Court warned against "the possibility that particular applications of vertical restrictions might justify *per se* prohibition under [Northern Pacific]."[198] It did recognize, however, that per se analysis would be justified only upon proof of "demonstrable economic effect rather than—as in *Schwinn*—formalistic line-drawing."[199] The line-drawing referred to is the *Schwinn* majority's distinction between restraints on resellers and those on consignees rooted in its curious respect for policy against suspension of alienation.

B. Where Does the Path Lead After Sylvania?

Had he also considered the rationale of *Dr. Miles*,[200] it would seem unlikely—despite the reference to repeal of the resale price maintenance enabling acts—that Justice Powell would have simultaneously indulged dicta sanctioning the per se characterization of resale price maintenance and attacked not only "formalistic line-drawing" but also the very line common to *Schwinn* and *Dr. Miles*,[201] unless he wished to invite attack on per se treatment of resale price maintenance. Aged, although questionable, doctrines are generally more insulated by stare decisis than are recent pronouncements.[202] Although the unexplained leaps in *Schwinn* fairly demanded curative action, one hopes that *Sylvania*'s single, but vital, unexplained leap does not similarly expose it to reversal by a future reconstituted Court. Assuming *Sylvania* will not be overturned or limited in the near future, it affords important lessons for marketing men and intermediate participants in the distribution chain.

Yet, there are pitfalls. For example, the Tenth Circuit withheld disposition of *Adolph Coors Co. v. A & S Wholesalers, Inc.*[203] pending

195. *Id.* at 2560.
196. *Id.* at 2562.
197. *Id.*
198. *Id.*
199. *Id.*
200. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
201. *Id.* at 407-08.
202. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2562 n.30 (1977). Ignoring stare decisis was made easier by the recency of the *Schwinn* decision and by the subsequent debate concerning its wisdom and application. Lurking in the background were the mathematically significant dissent of Chief Justice Burger in *Topco* who contended that *Schwinn* was actually a rule of reason decision rather than a per se characterization for the ages, United States v. Topco Assoc., Inc., 405 U.S. 596, 617-18 (1972), and, more significant philosophically, Justice Douglas' tendency to confine *Schwinn* to the facts of the bicycle industry. Albrecht v. Herald Co., 390 U.S. 145, 155 (1967) (concurring opinion).
203. 561 F.2d 807 (10th Cir. 1977).

the *Sylvania* decision.[204] As noted in the *Coors* decision, the Tenth Circuit had been a proponent of reconsidering the *Schwinn* rule and sought "greater flexibility."[205] That position had resulted from a Coors' encounter with FTC.[206]

Coors, a nationally famous brewer, marketed beer that, because of its short shelf life, must be refrigerated from plant to consumer and that is produced only at a plant in Colorado. To protect product integrity and its reputation as a brewer, Coors markets only in areas accessible from its plant and restricts sales to those who observe product handling directions that effectively prevent knowing shipment out of the broad marketing territory. The litigation began when Coors sued to restrain A & S from buying beer from retailers in Colorado and transporting it out of state in contravention of licensing statutes. A & S counterclaimed, alleging a violation of section 1 of the Sherman Act because of the territorially-oriented resale confinements. Coors' complaint was ultimately dismissed and the confinement issues were tried to a jury, which found for Coors. Both sides appealed.[207]

In response to the A & S contention that the trial court's failure to instruct the jury that Coors' efforts at "firm and resolute enforcement" of constraints on resale constituted a per se violation of section 1 of the Sherman Act,[208] the Tenth Circuit held that *Sylvania* "disposes of this issue adversely to A & S"[209] since restraints on dealers are to be tested by the rule of reason "*if* [their] positions and functions are indistinguishable from those of an agent or salesman of the [supplier] . . . ."[210] It must be assumed that the limitation implicit in use of "if" in this formulation was unconcious. The holding would otherwise require survival of the *Schwinn* per se rule when a relationship not comparable to agency or master-servant is proved. It is obvious that the major nonprice restrictions addressed in *White Motor* and *Schwinn*, although they can be used to create a vertically-integrated marketing team of otherwise independent merchants to promote interbrand competition, have other uses with potential social value. A supplier's attempts to reduce exposure to products liability or collisions with FDA provide easy examples. Location restrictions can promote the preservation of a licit security interest in goods as well as interbrand competition. If the opinion of the Court of Appeals for the Tenth Circuit were to be read literally, Justice Powell's clear consignment of the *Schwinn* per se rule to history would be frustrated. Those who favor a doctrine of "presumptive illegality" and would argue that

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204. *Id.* at 809.
205. *Id.*
206. Adolph Coors Co. v. FTC, 497 F.2d 1178, 1187 (10th Cir. 1974).
207. Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 809 (10th Cir. 1977).
208. *Id.* at 810, 812.
209. *Id.* at 812.
210. *Id.* at 813 (emphasis added).

the Tenth Circuit said exactly what it meant, must remember that *Schwinn* rejected "presumptive illegality."[211]

1. Suppliers' Interests.—Among Adam Smith's observations on the operation of a free-market economy was the thought that the interest of the provider ought to be attended only so far as necessary to promoting that of the consumer.[212] Smith recognized that merchants' main purpose was to serve themselves. His theory orients unregulated markets to the welfare of consumers rather than merchants regardless of whether such merchants are ultimate resources or intermediate participants in the distribution chain leading to consumers. Therefore, if interbrand competition is deemed valuable to consumers' immediate and long-range interests, consumer interests in such competition must be preferred over the interests of intermediate merchants who consider themselves either served or prejudiced by limited restraints on intrabrand competition. Implicit in this assumption is that restraints on intermediate merchants impact on society only when they are imposed by de facto monopolists or act to deny interbrand competition.

The increasing complexity of manufacturing and distribution processes prohibits consumer examination of ingredients and necessitates considerable reliance on supplier prudence. Failures in producer self-discipline that damage consumers have long been a predicate for government intervention. In stable societies, such interventions have not, however, hampered the selfish interest of suppliers who pursue a reputation for giving a fair measure,[213] albeit for nonaltruistic purposes. As distribution chains become more complex, the nonmonopolistic suppliers' same selfish interest in consumer satisfaction should not be hindered merely because they are not in privity with the consumers who are the beneficiaries of such selfishness.

Sylvania suggests that supplier-imposed restraints on resale should be tolerated as long as such selfish exercises occur in context of effective interbrand competition, do not deny the consumer choice implicit in such competition, and do not entail undue restraint on intermediate merchants' ability to pursue other commercial objectives. *Sylvania* recognizes that differing perceptions of efficiency obtainable through diverse modes of interbrand competition dictate that activity be continued on both inte-

211. *See* note 128 *supra*; Brief for Appellant at 38, 41, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). Very recently, while reversing a pre-*Sylvania* judgment for plaintiff, the Seventh Circuit invited plaintiff to prove that territorial constraints on a liquor distributor "justify per se prohibition based on demonstrable economic effect." General Bev. Sales Co. — Oshkosh v. East-Side Winery, 396 F.Supp. 590 (E.D. Wis. 1975), *rev'd*, 848 Antitrust & Trade Reg. Rep. (BNA) at 1-4, F (Jan. 26, 1978) (5th Cir. Jan. 9, 1978).

212. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, book I, ch. XI, at 358-59 (Pelican Reprint 1976).

213. In the realm of food standards, the interests of marginal suppliers may be served in the name of consumer protection, for example, by mandatory standards of identity.

grated and nonintegrated bases subject to diverse and often parochial influences such as taste, relative capitalization of competitors on all levels, or a sense of personal identification achievable with a local merchant. To the degree this is true, competition between literally integrated distribution systems and those more loosely arranged should be expected and encouraged. One form of encouragement is to permit independent suppliers and intermediate merchants to combine specialized competencies to divert market share from integrated competitors. The liberality displayed in *Sylvania* would not seem to extend to agreements designed to make semipermanent captives of resellers or suppliers.

2. *Supplier's Conduct.*—The rule of reason has historically addressed those restraints that are "unreasonable or undue." Brandeis' guide merits restatement:

> [W]hether the restraint . . . merely regulates and *perhaps* thereby promotes competition, or whether it is such as *may* suppress or even destroy competition . . . the court must ordinarily consider the facts *peculiar to the business to which the restraint is applied*; its condition before and after . . . ; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the *reason* for adopting the *particular remedy*, the purpose or end *sought* to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help . . . to interpret facts and to predict consequences.[214]

Both the rule and Brandeis' articulation were addressed to horizontal arrangements that present the most obvious threat to free markets. They are no less relevant to vertical relationships. His teaching is relevant to strategy as well as substance. Those who contemplate trade restraints perceived to be benign in purpose and effect should document the predicates for that belief and projected effects.

Prior to *Sylvania*, there was no comparable guidance for gauging vertically-imposed restraints. *White Motor* taught more by what it did not say than by what it said. Justice Powell, however, was not content with remitting us to Brandeis' words, *Northern Pacific*, and *White Motor*. Instead he posited that "[m]arketing efficiency is not the only legitimate reason for a manufacturer's desire to *exert control* over the manner in which his products are sold and serviced" as our society concentrates on product safety and quality.[215] *White Motors*' references to newcomers and systemic interbrand competition are rephrased and fleshed-out by a

214. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (emphasis added). In connection with the rule of reason, a Georgia district court drew an interesting distinction between hardship on a retailer who had been compelled to remain open on a twenty-four hour basis and anticompetitive conduct. Gordon v. Crown Central Petroleum Corp., 423 F.Supp. 58 (N.D. Ga. 1976), *aff'd*, 564 F.2d 413 (5th Cir. 1977).

215. Continental TV, Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2560 n.23 (1977) (emphasis added).

series of examples[216] indicating that, although Justice Powell would find procompetitive merit in agreements easing intrabrand competition,[217] he would not do so at the expense of intermediate merchants' ability to refuse collaboration in the collective interbrand effort. He also resurrected the argument that permitting vertically-imposed restraints would benefit small businessmen who otherwise fall victim to their suppliers' need to integrate in response to integrated competition.[218] This argument accords with the need recognized in Robinson-Patman jurisprudence to permit a supplier to grant a discriminatory price break that enables its customer to meet competition from their common integrated competition.[219]

While the central lesson of *Sylvania* is that vertical restraints clearly oriented to furthering interbrand competition or consumer satisfaction will survive muster, counsellors should pay careful heed to the nature of the restraint in several senses. Does it go beyond that needed for the assigned competitive or consumer-welfare objective? How vigorously does a supplier *suggest* resale pricing? Are territorial or customer-selection constraints linked to exclusive dealing for such great periods of time or in such finite territories as to make the constrained merchant a virtual captive? Are ancillary features of the relationship (*e.g.*, book-keeping, insurance, attendance to suppliers' affairs, notice periods appropriate to cancellation, minimum stocking) so demanding that they preempt intermediate merchants' expansion into or with other lines whether they be similar, complementary, or diverse?

While, assuming the absence of tying or resale price-fixing, the life of a supplier who deems other vertically-imposed restraints conducive to its competitive struggle has been somewhat simplified, its counsellors should reconsider ***Brown Shoe II***,[220] particularly in light of the later *S. & H.* decision,[221] and advise against assembly of such a package of restraints and dependency-inducing benefits from which FTC could discern a pattern of preempting distribution channels.[222]

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216. *Id.* at 2560 n.22.
217. *Id.* at 2560-61.
218. *Id.* at 2562 n.27.
219. FTC v. Sun Oil Co., 371 U.S. 505, 512 n.7 (1963).
220. FTC v. Brown Shoe Co., 384 U.S. 316 (1966).
221. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 (1972).
222. The decree entered against Schwinn has been vacated. Note 144 supra. Subsequently, the Schwinn Bicycle Company terminated dealer franchises as of March 31, 1978 and invited applications for renewal. Interestingly, the form of application provides not only for an estimate of the percentage of sales to be represented by Schwinn and "Schwinn approved" bicycles, but also identification of other brands to be carried. It also contains a representation of understanding that Schwinn does not require exclusive dealing. A proposed form of agreement includes Schwinn's offer of "a market with an established potential and a limited number of Authorized. . . Dealers"; a dealer's undertakings to keep "a neat and orderly retail store in a location approved by Schwinn" and to recommend "purchase of Schwinn products"; and a mutual covenant disclaiming either an agency relationship or appointment of the dealer as a wholesaler except for authorizing resale "to other Authorized Schwinn dealers." Although the impact on dealers' perceptions is unknown, the location and recommendation obligations do not appear limiting on dealers' conduct. *See* Renewal Applicaton and Authorized Dealer Agreement (on file in the Dickinson Law Review office).